IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 323 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE N.J.PANDYA and

Hon'ble MR.JUSTICE S.D.PANDIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? No.

2. To be referred to the Reporter or not? No.

3. Whether Their Lordships wish to see the fair copy of the judgement? No.

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No.

5. Whether it is to be circulated to the Civil Judge? No.

KOLI RAMA HAMIR

Versus

STATE OF GUJARAT

Appearance:

MR PRADYUMAN B BHATT for Petitioners

Mr. S.R.Divetia APP for Respondent No. 1

CORAM : MR.JUSTICE N.J.PANDYA and
MR.JUSTICE S.D.PANDIT
Date of decision: 23/04/97

ORAL JUDGEMENT (Per:Pandya.J)

In all six accused were facing charge for offence under section 147,148,324,302 read with section 149 and they were also charged for the offence under sections 324,325 and 326 read with section 149, all of IPC before the court of the learned Addl. Sessions Judge, Bhavnagar in Sessions Case No. 23/87. At the end of the trial , by the judgment dated 12.4.89 the learned Judge was pleased to acquit four of the six accused by giving benefit of doubt and convicted the first two accused. These two convicts have preferred the present appeal. The incident alleged to have happened on 3.11.86 on the New Year Day according to Gujarati calendar between 6 to 6.15 p.m. when, according to the prosecution all the six accused had gone to the house of Mashari Tapu. The house of deceased Mashari Tapu and that of complainant Chandu Tapu is situated in a manner as to share the same "Osri" and Chandu Tapu and his family members were very much there at the time of the incident as were family members of the deceased.

2. Accused nos. 1 and 2 physically dragged the deceased Mashari out of the house and thereafter accused no.1 took out a Gupti and gave a blow on the back side of the deceased as a result of which the right lung of the deceased was badly injured and before Mashrai could be brought to hospital at Mehsana from village Sedarada where the incident happened he succumbed to it.

3. According to the prosecution the accused no.2 was armed with an axe which he had used in respect of Chandu Tapu. When the said complainant had tried to intervene to save his brother Mashari, the reverse portion of the axe said to have been used result into injury on the person of said Chandu Tapu. It is this Chandu Tapu who has filed a complaint before the police.

4. The defence taken before the Trial Court is that of total denial. At the same time taking advantage of the fact that both the accused had received injuries for which certificates were produced before the Trial Court and tried to make out a case of prosecution having failed to explain the injury to the accused.

5. However, Dr. Trivedi exh.41 in the course of his cross examination where the learned Presiding Officer also participated by putting questions to witness exh.41, disclosed is is that the injuries on the person of accused were superficial and of of trivial nature and could have been caused because of hard and blunt substance. Apart from that the case that came to be registered against both the appellants along with other accused was said to have occurred according to the prosecution version of that case was at different place and different time. The place being in front of the shop of Mahashanker Narbheram Jani. That means trial of two incidents happened on 3.11.86 but the time being different , obviously it may be made by the defence to take advantage of the so called injuries to the accused and thereby to build up a case of prosecution having failed to explain the injury. But after elaborate consideration in para 18 (page 36) of the judgment of the trial court, said plea has been rejected. We are in complete agreement with the said finding given by the learned Judge.

6. For this purpose, further discussion can be found in para 19 of the judgment(page 169 and 170 of the paper book) continued further upto page 174 where para 21 ends.

7. After considering the judgment reported in AIR 1988 (SC) 863 and XXVI GLR 574 the learned trial Judge came to the conclusion that the the case before him. even if the prosecution has not explained the injuries to the accused, no effect will be there in the case of the prosecution against the accused. Looking to the aforesaid circumstances especially that the incident took place at a different spot and the time is also different, obviously no effect is to be found even if the injuries are not explained.

8. In any case the certificates exhs. 27 and 28 indicate that the injuries on the person of the accused were 5-6 days old and very minor and superficial.

9. Now coming back to the alternative argument made before the trial court which is repeated here viz. that the accused no.1 has given only one blow and accused no.2 has not done anything in respect of the deceased, both of them should be dealt with individually in respect of the act attributed to them and they need not be made to suffer for the deed of the other. Thus the usual submission is to the effect that the prosecution has not been able to prove the case of common intention and

sharing thereof by either of the accused.

10. An attempt was also made by the learned advocate for the appellant regarding the application of section 149 IPC and without charge having been framed under section 34 IPC, no conviction can be made with the aid of section 34 IPC.

11. I shall deal with the last submission first. It is submitted that offence under section 149 IPC is registered in order to establish the existence of common object, which in our opinion would cover the idea of common intention. Like section 149, section 34 also deals with the cases of constructive criminal liability. It provides that where a criminal act is done by several persons in furtherance of the common intention of all , each of such person is liable for that act in the same manner as if it were done by him alone. S. 34 can be applied when the evidence discloses on element in participation in the action on the part of all the accused person.

12. In the decision reported in AIR 1986 SC 1649, the apex court has held that the accused can be convicted with the aid of section 34 IPC instead of section 149 IPC. In the case before the apex court it was found that in pursuance of the common object of unlawful assembly , the acts were committed that could not be completely established by the prosecution and therefore, and therefore, the members of the unlawful assembly who had not actually participated could not be convicted with the aid of section 149 IPC. However, the persons who had actually participated in the commission of the crime could in the circumstances so warrant be convicted with the aid of section 34 when it was shown that they were sharing common intention. Same situation is found here.

13. Accused nos 1 and 2 had entered the house of deceased and dragged and thereafter obviously blow was given with the aid of Gupti by accused no.1. Gupti was attached and sent to FSL along with the clothes of the deceased. In the report of the FSL at exh.54, the clothes of the deceased were found containing blood of human origin of group 'O' and same was the finding as regards the blood stain on Gupti. The tear of the clothes of the deceased corresponds to the injuries and also so the dimension.

14. All told therefore, in our opinion the Trial Court correctly come to the conclusion about the

conviction of accused nos 1 and 2 and appreciating various statements has again come to the conclusion about their having shared the common intention. The conviction thus rendered by the Trial Court in respect of accused no.1 holding him guilty for offence under section 302 IPC and under section 324 read with section 34 IPC and obviously holding the appellant no.2 guilty for offence under section 302 IPC read with section 34 and for offence under section 324 IPC is eminently justified and is confirmed. The accused appellants are convicted for life for the offence under section 302 IPC and separate sentences are awarded to the appellants for the offence under section 324 IPC. However, both the sentences are ordered to run concurrently,

15. The net result therefore, is that the appeal fails and the same is dismissed.

(N.J.Pandya.J)

(S.D.Pandit.J)